Syarikat Ying Mui Sdn Bhd v Muthusamy a/l Sellapan and other appeals

HIGH COURT (IPOH) — CIVIL APPEAL NO 11–19 OF 1996
CLEMENT SKINNER JC
17 JUNE 1999

Civil Procedure *— Affidavits — Swearing of — Whether deponent must be authorized to swear an affidavit — Whether authority a prerequisite to swearing affidavit — Rules of the High Court 1980, O 41*

Civil Procedure *— Affidavits — Whether relevant — Deponent the former presiding magistrate — Differences between handwritten notes of proceedings and typed, certified notes of proceedings — Affidavit a straight forward account of what transpired before magistrate and what he recorded in his handwritten notes of proceedings — Whether affidavit relevant — Whether affidavit could be received and read*

Civil Procedure *— Amendment — Effect of amendment — Whether substituting one cause of action with another of inconsistent character*

Civil Procedure *— Amendment — Delay in applying for amendment — Discretion of court — Whether amendments would result in prejudice*

Evidence *— Documentary evidence — Certified and typed notes of proceedings — Whether primary or secondary evidence — Handwritten notes of proceedings — Whether primary or secondary evidence*

On 7 March 1983, the appellant had commenced 16 different suits at the Cameron Highlands magistrate's court to recover possession of a piece of land ('the land') from the respondents. On 6 August 1985, one of the appellant's actions ('MC 14/83') came up for hearing in the Cameron Highlands magistrates' court before one Mr Satchi. In his notes of proceedings, Mr Satchi wrote the following: 'Mr Hoh agrees with Mr Thevindran and vice versa that the decision in this case will be binding on all other 13 civil actions ...'. The words showed that both counsel had agreed that the decision in MC 14/83 would bind 13 other civil actions mentioned in the notes of proceedings. The magistrate eventually dismissed the appellant's claim in MC 14/83. Some ten years later after the decision in MC 14/83, the appellant on 26 September 1995 applied to amend the statements of claim in the 16 suits. The respondent, in contesting the application argued that counsel for the appellant had agreed that the decision in MC 14/83 would bind the other 13 cases, as recorded by the magistrate in his written notes of proceedings. The appellant on the other hand contended that there was no such agreement as the word 'agrees' in the written notes was in fact the word 'argue'. This was because the word 'argue' and not 'agrees' appeared in the certified true copy of the typed notes of proceedings. The respondent however filed an affidavit affirmed by the former magistrate — Mr Satchi — to which was

exhibited a copy of his handwritten notes of proceedings. In the affidavit, Mr Satchi averred that it was the word 'agrees' that he had written in the notes of proceedings and that the parties did in fact agree that they would be bound by the decision in MC 14/83. The application to amend was subsequently dismissed as the magistrate found that the appellant had delayed for some 14 years in applying for the amendments without any explanation and that the appellant had agreed to be bound by the decision in MC 14/83. On appeal to the High Court, the appellant argued the following issues: (i) that the affidavit of Mr Satchi should be excluded from the proceedings as he was not a respondent and neither did he state in his affidavit that he had been authorized by the respondents to affirm his affidavit on their behalf; (ii) that the typed, certified notes of proceedings in MC 14/83 must take precedence or prevail over the handwritten notes of proceedings of Mr Satchi; (iii) that Mr Satchi's affidavit was contrary to public policy, scandalous, irrelevant or otherwise oppressive and should be struck out; (iv) that the amendments sought would not change the character of the suits; and (v) that the court should not be concerned too much with the issue of delay as the an amendment may be made at any stage of the proceedings.

Held, dismissing the appeal:

(1) Order 41 of the Rules of the High Court 1980 ('the RHC') deals specifically with affidavits filed for use in any cause or matter and is silent on any requirement that a deponent must be authorized to swear an affidavit. Authority is not a prerequisite to swearing an affidavit (see pp 630H–631A).

(2) The typed and certified notes of proceedings, which constituted secondary evidence by virtue of s 63 read with ss 65 and 74 of the Evidence Act 1956 ('the Act'), could not prevail over the handwritten notes of proceedings which constituted primary evidence by virtue of s 62 of the Act. In any event, since by virtue of s 61 of the Act, the contents of documents may be proved either by primary or secondary evidence, the real issue was which set of notes of proceedings reflected the correct position (see p 631D–F).

(3) The purpose towards which a judicial officer or an ex-judicial officer swears an affidavit determines its desirability, relevance and justification and whilst it would be improper to explain away or add reasons or supplement a decision thereby, a clerical mistake in a record of proceedings will be corrected by judicial intervention once its existence comes to light, despite the record having been certified. Since it was Mr Satchi's handwriting which was the subject of dispute, his affidavit was very relevant. A reading of the his affidavit showed that it was a straight forward account of what transpired in front of him sitting as a magistrate and what he recorded in his handwritten notes of evidence,

without in any way making reference to the certified notes of proceedings or attempting to amend the latter. Upon receiving and reading Mr Satchi's affidavit, it becomes clear that the appellant had by counsel agreed that the decision in MC 14/83 would bind the 13 other cases mentioned. That being the case, it is not open to the appellant to now amend the statements of claim in the 13 cases (see pp 633B–634C).

(4) Although the fact that the relief sought remains unchanged is a factor that should be taken into account when deciding whether an amendment would change the character of the suit, the court will concern itself more with the facts relied upon by the appellant in claiming that relief because it is principally upon those facts that the court will arrive at a finding on whether or not the character of the suit has changed. On the facts, it was evident that the appellant sought to substitute one cause of action with another of inconsistent character based on facts which were not the same as already pleaded (see pp 634G–635A).

(5) After pleadings are deemed to be closed, an amendment can only be made with leave of the court. It becomes a matter at the discretion of the court and when a party requires discretion to be exercised in its favour, delay is always a relevant consideration in the grant or withholding of it because a court will only assist the vigilant and not the indolent. On the facts, the pleadings had long closed and the appellant had waited for some 12 years in applying for amendments without any explanation why they had not come sooner. The delay in making the application to amend also reflected the bona fides of the appellant in making the application after such a long time (see p 635E–G).

[[Bahasa Malaysia summary

Pada 7 Mac 1983, perayu telah memulakan 16 tindakan guaman yang berbeza di mahkamah majistret Cameron Highlands bagi mengembalikan hakmilik sekeping tanah ('tanah itu') daripada responden-responden. Pada 6 Ogos 1985, salah satu daripada tindakan perayu ('MC 14/83') telah timbul untuk pembicaraan di mahkamah majistret Cameron Highlands di hadapan seorang bernama En Satchi. Di dalam nota prosiding beliau, En Satchi telah menulis yang berikut: 'Encik Ho bersetuju dengan En Thevindran dan begitu juga sebaliknya bahawa keputusan di dalam kes ini akan mengikat semua 13 tindakan sivil yang lain ...'. Perkataan-perkataan itu menunjukkan bahawa kedua-dua orang peguam telah bersetuju bahawa keputusan di dalam MC 14/83 akan mengikat 13 tindakan sivil lain yang disebutkan di dalam nota prosiding. Majistret akhirnya telah menolak tuntutan perayu di dalam MC 14/83. Sepuluh tahun setelah keputusan di dalam MC 14/83, perayu pada 26 September 1995 telah memohon untuk meminda pernyataan tuntutan di dalam 16 tindakan guaman itu. Responden, di dalam mempertikaikan

A permohonan itu telah menghujahkan bahawa peguam perayu telah bersetuju bahawa keputusan di dalam MC 14/83 akan mengikat 13 kes-kes yang lain itu, sepertimana yang direkodkan oleh majistret di dalam nota prosiding bertulis beliau. Perayu dari satu segi menegaskan bahawa tiada perjanjian sepertinya kerana perkataan 'bersetuju' di dalam nota prosiding bertulis adalah sebenarnya B perkataan 'menghujahkan'. Ini adalah kerana perkataan 'menghujahkan' dan bukannya perkataan 'bersetuju' timbul di dalam salinan asal nota prosiding yang disahkan yang telah ditaipkan itu. Responden telah bagaimanapun memfailkan suatu afidavit yang disahkan oleh bekas majistret — En Satchi — di mana telah C dieksibitkan satu salinan nota prosiding yang ditulis tangan beliau. Di dalam afidavit beliau, En Satchi menegaskan bahawa adalah perkataan 'bersetuju' yang beliau telah tulis di dalam nota prosiding dan bahawa pihak-pihak itu telahpun bersetuju agar mereka terikat dengan keputusan di dalam MC 14/83. Permohonan untuk meminda telah akhirnya ditolak kerana majistret mendapati perayu telah lewat D selama 14 tahun di dalam memohon pindaan-pindaan itu tanpa sebarang penjelasan dan bahawa perayu telah bersetuju untuk terikat dengan keputusan di dalam MC 14/83. Di dalam rayuan ke Mahkamah Tinggi, perayu telah menghujahkan isu-isu berikut: (i) bahawa afidavit En Satchi hendaklah tidak dibenarkan di dalam prosiding kerana beliau bukan merupakan responden dan beliau juga E tidak menyatakan di dalam afidavit beliau bahawa responden telah memberikan kebenaran kepada beliau untuk mengesahkan afidavit beliau bagi pihak mereka; (ii) bahawa nota prosiding yang telah disahkan, ditaip di dalam MC 14/83 mesti diambil sebagai duluan atau mengatasi nota prosiding bertulis tangan En Satchi; (iii) bahawa afidavit En Satchi bercanggah dengan polisi awam, penuh skandal, F tidak berkaitan atau bersifat menindas dan hendaklah dibatalkan; (iv) bahawa pindaan-pindaan yang dipohon tidak akan menukar sifat tindakan guaman itu; dan (v) bahawa mahkamah tidak perlu risau sangat tentang isu lewat kerana suatu pindaan boleh dibuat pada mana-mana peringkat prosiding.

G

Diputuskan, menolak rayuan itu:

(1) Aturan 41 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') memperkatakan dengan khusus tentang afidavit-afidavit yang difailkan untuk kegunaan di dalam apa-apa sebab atau perkara H dan tidak disebutkan tentang apa-apa keperluan bahawa seorang deponen perlu diberi kuasa untuk mengangkat sumpah suatu afidavit. Kuasa bukan merupakan suatu yang diwajipkan untuk mengangkat sumpah satu afidavit (lihat ms 630H–631A).

(2) Nota prosiding yang disahkan dan ditaipkan itu, yang merupakan I keterangan sekunder menurut s 63 dan s 74 Akta Keterangan 1956 ('Akta itu'), tidak boleh mengatasi nota prosiding yang ditulis tangan yang merupakan keterangan utama menurut s 62

Akta itu. Di dalam apa keadaanpun, oleh kerana menurut s 61 Akta itu, kandungan dokumen-dokumen mungkin boleh dibuktikan sama ada melalui keterangan utama atau sekunder, isu sebenar adalah set nota prosiding manakah yang menerangkan kedudukan sebenar (lihat ms 631D–F). A

(3) Tujuan seorang pegawai kehakiman atau bekas pegawai kehakiman mengangkat sumpah suatu afidavit menentukan keperluan, kaitan dan justifikasi dan walaupun adalah tidak betul untuk menerangkan atau menambahkan alasan-alasan atau menambahkan keputusan itu, suatu kesilapan kerja perkeranian di dalam rekod prosiding boleh dibetulkan dengan campur tangan kehakiman sebaik sahaja kewujudannya diketahui, sungguhpun rekod itu telah disahkan. Oleh kerana tulisan tangan En Satchi menjadi subjek pertikaian, afidavit beliau adalah amat berkaitan. Dengan membaca afidavit, beliau menunjukkan bahawa ia adalah suatu cerita yang jelas dan mudah tentang apa yang berlaku di hadapan beliau sebagai seorang majistret dan apa yang telah direkodkan oleh beliau di dalam nota keterangan yang ditulis tangan beliau, tanpa merujuk dengan apa cara sekalipun kepada nota prosiding yang disahkan atau mencuba untuk meminda yang kedua itu. Setelah menerima dan membaca afidavit En Satchi, adalah jelas bahawa perayu telah melalui peguam bersetuju bahawa keputusan di dalam MC 14/83 akan mengikat 13 kes-kes lain yang dinyatakan itu. Jika sedemikian, adalah tidak diterima untuk perayu sekarang meminda pernyataan tuntutan itu di dalam 13 kes-kes itu (lihat ms 633B–634C). B C D E

(4) Walaupun fakta bahawa relif yang dicari masih tidak berubah adalah merupakan suatu perkara yang perlu diambil kira apabila memutuskan sama ada suatu pindaan itu akan mengubah sifat suatu tindakan guaman, mahkamah akan lebih prihatin dengan fakta-fakta yang perayu bergantung kepada di dalam menuntut relif itu kerana di atas fakta-fakta itu terutamanya mahkamah akan sampai ke suatu penemuan tentang sama ada sifat tindakan guaman itu telah berubah atau tidak. Berdasarkan fakta-fakta itu, adalah jelas bahawa perayu telah cuba untuk menggantikan suatu kausa tindakan dengan satu yang lain yang bersifat tidak konsisten berdasarkan fakta-fakta yang tidak sama sepertimana yang telahpun dikemukakan (lihat ms 634G–635A). F G

(5) Setelah pliding dianggap telah berakhir, suatu pindaan hanya boleh dibuat dengan kebenaran mahkamah. Ia menjadi satu perkara budi bicara mahkamah dan apabila suatu pihak menghendaki balasan dilaksanakan untuk pihaknya, kelewatan selalu merupakan suatu balasan yang relevan di dalam pemberian atau keengganan memberikan kebenaran itu kerana mahkamah akan hanya membantu mereka yang sentiasa berjaga-jaga dan bukan yang indolen. Berdasarkan fakta-fakta itu, pliding telah lama berakhir dan perayu telah menunggu selama 12 tahun untuk H I

memohon membuat pindaan-pindaan tanpa sebarang penjelasan kenapa mereka tidak berbuat demikian lebih awal lagi. Kelewatan di dalam membuat permohonan untuk meminda juga menggambarkan bona fide perayu di dalam membuat permohonan setelah sekian lama (lihat ms 635E–G).]

Notes

For cases on affidavits generally, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 219–293.

For a case on effect of amendment, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 322.

For cases on delay in applying for amendment, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 319–321.

For cases on documentary evidence generally, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 688–789.

Cases referred to

Abdul Salam bin Mohamed Salleh v PP [1991] 3 MLJ 280 (refd)

Haji Sazali, Re [1992] 2 MLJ 864 (refd)

Hansell v Spink [1943] Ch 396 (refd)

Khor Cheng Wah v Sungai Way Leasing Sdn Bhd [1996] 1 MLJ 223 (refd)

Sabah Bank Bhd v Pemborong Keningau Sdn Bhd & Ors [1991] 3 CLJ 2590 (refd)

Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Legislation referred to

Evidence Act 1956 ss 61, 62, 63, 65, 74

Penal Code s 201

Rules of the High Court 1980 O 20, 41 r 1(4)

Subordinate Courts Rules 1980 O 8 r 18 , O 15

David Hoh (*Lim & Hoh*) for the appellant.

S Athithan (*Thevin Chandran & Wong*) for the respondents.

Cur Adv Vult

Clement Skinner JC: There are 16 appeals before me which, by order of the High Court, Ipoh, made on 27 November 1997, were consolidated to be heard together. The appellant is the registered owner of a parcel of land described as State Lease 556, Lot 24 Mukim of Ulu Telom, Cameron Highlands, ('the said land') which is occupied by 16 different persons ('the respondents') who each occupy different portions of varying sizes of the said land. On 7 March 1983, the appellant commenced 16 different suits at the

Cameron Highlands Magistrate's Court to recover possession of the said land from the respondents. A

In all the cases, the appellant's pleadings are in their material parts identical, brief, and consist of 4 paras only. The whole of the appellant's case is to be found in paras 3 and 4 thereof which reads (and here I adopt for convenience, what is pleaded in Rayuan Sivil No 11–19–96): B

> (3) A part of the said piece of land were let by the plaintiff to the defendant by an oral agreement on a monthly tenancy from the lst day of January 1955 at a rent of RM1.67 per month.
>
> (4) The tenancy was duly determined by a notice to quit dated 17th day of September 1982 and served on the defendant on 19th day September 1982 and which expired on the 18th day of December 1982. C

All the respondents filed identical defences. In essence, the respondents aver that they had been cultivating the said land on the undertaking of the appellant that the respondents would be allowed to do so for life. The respondents also aver that the appellant's notice to quit is bad in law and invalid. D

That was the state of the pleadings between the parties on 6 August 1985, Cameron Highlands Magistrate's Court Civil Summons No 14 of 1983 ('MC 14/83') between the appellant and one Cho Chew came on for trial. During the course of that trial, the learned magistrate (who was actually the president of the Sessions Court, Ipoh, but sitting as a E magistrate) recorded what transpired between counsel for the appellant and counsel for Cho Chew who also represented the 16 respondents in this appeal. A dispute has now arisen on one crucial word recorded by the learned magistrate. Without trying at this stage to resolve that dispute, I will simply set out the passage recorded by the magistrate and indicate the disputed word in italics. This is how it reads: F

> Argue
>
> Mr Hoh *agrees* with Thevindran and vice versa that the decision in this case will be binding on all the other thirteen Civil Actions No 4/83, 5/83, 7/83, 8/83, 9/83, 10/83, 11/83, 13/83, 16/83, 19/83, 22/83, 23/83, 24/83 as the G plaintiff will be asked the same question and will give the same evidence in all the other 13 above actions, and as the plaintiff is the same in all the actions and also as all the defendants in the 14 actions occupy the same Lease Negeri Lot 24 Mukim of Ulu Telom.

The respondents say that the word 'agrees' quoted above is the word appearing in the handwritten notes of proceedings of the learned magistrate H and that accordingly, the decision in MC 14/83 is binding on all the 13 other cases mentioned in the notes. The appellant on the other hand says 'argue' is correct as this is the word that appears in the certified copy of the typed notes of proceedings in MC 14/83.

After having heard all the evidence adduced by both the appellant and I Cho Chew, the learned magistrate dismissed the appellant's claim and give his full reasons for doing so in a written judgment on 21 November 1985.

A Some ten years after the decision in MC 14/83, the appellant on 26 September 1995, filed at the Magistrate's Court Cameron Highlands, applications to amend the statements of claim in their 16 suits. By their proposed amendments which are in identical term, the appellant:

(i) alleges that they became owners of the land since 4 October 1976;

B (ii) deletes the whole of their assertion that the said land was let by the appellant to the respondents by an oral agreement on a monthly tenancy from 1 January 1955 at a monthly rental and instead alleges that the said land is occupied by the respondents without the consent and/or permission of the appellant;

C (iii) deletes the whole of their assertion that the tenancy was determined by a notice to quit dated 17 September 1982, which was served on 19 September 1982, and instead alleges that upon discovering the name of the respondents the appellant served on the respondents a written notice to vacate that part of the said land occupied by the respondents;

D (iv) finally the appellant deletes completely its claim for rent or mesne profits.

The applications to amend came up before the learned magistrate on 13 November 1995, when it was opposed by the respondents. One of the grounds on which the amendments were opposed was that the appellant E had agreed by their counsel that the decision in MC 14/83 would bind the other 13 cases recorded in the notes of proceedings. In support of that ground, the respondents filed an affidavit duly sworn by Mr W Satchithanandhan on 16 October 1995, ('Mr Satchi's affidavit') who was the then President of the Sessions Court, Ipoh, but sat as a magistrate F and heard MC 14/83. He has since left judicial service and states in his affidavit that he is now in private practice. To Mr Satchi's affidavit is exhibited a copy of his handwritten notes of proceedings recorded in MC 14/83. Mr Satchi in his affidavit states, inter alia, that:

(a) it was agreed between counsel who appeared before him for the G appellant and respondents respectively that the decision in MC 14/83 will bind all the other Civil Suits referred to in his notes;

(b) his handwritten notes reads 'Mr Ho agrees with Theivanthiran and vice versa that the decision in this case will be binding on all other 13 Civil Actions Nos ...';

H (c) the word 'argue' which appears above the word 'agrees' in his handwritten notes is not his notation and that that notation, ie the word 'argue', is wrong.

After hearing submissions, the learned magistrate dismissed the appellant's application to amend and has since given reasons for so doing. The learned magistrate found that the appellant had delayed for some 14 years in I applying for amendment without any explanation for the delay and that the appellant had agreed to be bound by the decision in MC 14/83. Being dissatisfied with that decision, the appellant brings these appeals.

Before me, Mr David Hoh learned counsel for the appellant referred to the decision of the Federal Court in the case of *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213 at p 214 and submitted that applying the principles of law to be found there, the appellant's application to amend should be allowed as it comes within the principles stated in the Yamaha case in that:

(1) the appellant's application to amend is made bona fide;

(2) no prejudice will be suffered by the respondents if the amendments are allowed as the application is being made before the trial of these actions wherefore the respondents can still amend their defences. Any inconvenience caused to the respondents can be compensated in costs;

(3) the amendments do not change the character of the suits into another of inconsistent character.

Counsel for the appellant also advanced two further reasons why the amendments should be allowed. Firstly, delay is not a factor the court should pay too much attention to as by O 15 of the Subordinate Court Rules ('the SCR'), and its equivalent in O 20 of the Rules of the High Court 1980 ('the RHC'), amendments may be made at any stage of the proceedings. Secondly, Mr Satchi's affidavit should not be considered at all in determining this appeal and should instead be taken off the record.

I shall now consider each of the matters raised by the appellant but will take them in the order I find most convenient in deciding the matter at hand.

Mr Satchi's affidavit

Counsel for the appellant has made a concerted effort to exclude Mr Satchi's affidavit from these proceedings and has given various reasons for doing so. It is said that Mr Satchi is not a respondent in any of these 16 appeals and he has not stated in his affidavit that he has been authorised by any of the respondents to affirm his affidavit on their behalf. Counsel for the appellant has not referred to any case law or rules of court to support his contention which suggests that apart from affidavits sworn by the parties themselves, the only other affidavits that may be read in a cause or matter are those sworn to by persons who have been authorized to do so by a party in those proceedings. In *Sabah Bank Bhd v Pemborong Keningau Sdn Bhd & Ors* [1991] 3 CLJ 2590, the court deleted an affidavit from the record on the grounds that it was sworn to by the solicitor for the defendant. In doing so, the court stated that affidavits are personal to those who swear them and so it is not the business of anyone else unless he is so authorized to depose an affidavit. With respect, I am unable to agree with that decision in so far as it relates to authorization to swear an affidavit. Order 41 of the RHC deals specifically with affidavits filed for use in any cause or matter and is conspicuously silent on any requirement that a deponent must be authorised to swear an affidavit. It is pertinent to note that by virtue of r 1(4) of the Order, an employee of a party to a cause or matter may swear an affidavit but the affidavit must state that fact. There is however no

A requirement that such employee must go on further to state that he is also authorized to swear the affidavit before it can be read in the cause or matter. This shows that authority is not a prerequisite to swearing an affidavit. If that be the case, I can see no justification for the imposition of such a requirement on any deponent of an affidavit. Perhaps the position becomes clearer by looking at how evidence is adduced in court at different stages of B a cause or matter. At trial, evidence will normally be introduced through the oral testimony of a witness but there is no requirement that before a person testifies, he must be authorized to do so by the party who calls him. If authority to testify is not a prerequisite at a trial that position must surely not change just because a matter is at an interlocutory stage when evidence C is introduced through affidavit evidence. I accordingly find no reason to exclude Mr Satchi's affidavit on this ground.

It is next said that the typed notes of proceedings in MC 14/83, which have been certified by the Magistrate, Cameron Highlands, (not Mr Satchi) must take precedence or prevail over the handwritten notes of proceedings of Mr Satchi because, according to counsel, the typed certified notes D constitute primary evidence whilst the handwritten notes of Mr Satchi only constitutes secondary evidence. I regret I do not agree with this submission because by s 62 of the Evidence Act 1950 ('the Act'), primary evidence means the document itself produced for the inspection of the court which in this instance must refer to the handwritten notes of proceedings and not E to the certified notes of proceedings, which, by the provision of s 63 read with ss 65 and 74 of the Act, clearly falls within the definition of secondary evidence.

Having said that, I draw attention to s 61 of the Act which states that the contents of documents may be proved either by primary or secondary evidence. That being the position, the question of which notes of F proceedings should take precedence over the other does not arise. The real question for decision is, which notes of proceedings reflects the correct position and that question will be dealt with shortly. It is for the above reasons that I have not found it necessary to consider the reference to *Phipson on Evidence* (14th Ed) 974 and the case of *Hansell v Spink* [1943] G LR 396, referred to by counsel for the appellant.

It is lastly said that it is unheard of for an ex-sessions court judge, to come back after a decade and amend the certified notes of proceedings thereby attempting to change the entire complexion of the notes. It is counsel's submission that to do so is wrong, unjustifiable and bad practice because if every ex-judge were to swear affidavits in respect of cases he had H presided over a decade ago so as to change the certified notes of proceedings this would lead to chaos in the courts. Counsel accordingly submitted that Mr Satchi's affidavit is contrary to public policy, scandalous, irrelevant or is otherwise oppressive and should be struck out.

The question is, does Mr Satchi's affidavit attempt to do what counsel I says it does and can it be characterized in the manner counsel has. Before turning to the contents of Mr Satchi's affidavit, I wish to refer to two cases in which judicial opinion has been expressed on the question of an affidavit

being sworn or a written explanation offered by a judicial officer in respect of a matter he has presided over. Notwithstanding that the opinions are expressed in criminal proceedings, my view is that they would be no less applicable in civil proceedings. In *Re Haji Sazali* [1992] 2 MLJ 864, a magistrate had remanded a person at a drug rehabilitation centre for two years. On an application to quash the order, the magistrate filed an affidavit in which he averred that he had considered all the relevant matters so required of him by law. The notes of proceedings however did not show this to be so. On being urged by counsel to exclude the affidavit as irrelevant, Chong Siew Fai J, (as his Lordship then was) said at p 867:

> On the facts and circumstances of the instant case, I agree that it is not open or appropriate for the learned magistrate to subsequently explain away or add reasons to his decision by stating as he did ... when in his judgment contained in the note of proceedings, he apparently was not shown to have done so.

A little later on the same page, the learned judge went on to say:

> However, I must not be taken to mean that under no circumstances can a presiding magistrate make an affidavit when his decision is the subject matter of judicial review. That would be too general a statement. In certain situations he might be justified and, indeed, entitled to do so or even to appear at the hearing, for example, when his character or bona fides is called in question; *R v Camborne Justices, ex p Pearce* [1955] 1 QB 41, *R v Thorton & Ors* (1898) 67 LJ QB 249.

In the Singapore case of *Abdul Salam bin Mohamed Salleh v PP* [1991] 3 MLJ 280, a police sergeant was charged with causing evidence to disappear contrary to s 201 of the Penal Code. He was tried before a district court and on conviction appealed. When the certified typewritten notes of evidence were supplied for the preparation of the record of appeal, it was discovered that the district judge had recorded in his notes that at the end of the prosecution's case the defence was called on an amended charge. There had in fact been no application for any amendment by anyone. The appellant complained on appeal that the amendment was false. Whilst the appeal was in progress, the district judge who had by then become the registrar of trade marks, and was therefore not in a position to contradict the certified typewritten notes of evidence wrote a letter to explain that he had it in mind to amend the charge but had inadvertently failed to do so. After arguments and whilst judgment on the appeal was reserved, the district judge had an opportunity to check his handwritten manuscript notes against the certified typed notes and noticed that the typist had misread the word 'original' charge in his manuscript notes and typed it as 'amended' charge in the certified notes. The district judge accordingly wrote a second letter to explain what had happened and that his first explanation was in error. The learned judge accepted that the word in the handwritten manuscript notes of the district judge was legible and it read 'original' and not 'amended' and that accordingly the appellant was properly convicted. On permission being granted to refer a question to the Court of Criminal Appeal, one of the four questions posed was: whether the signed copy of the record of the trial may be corrected by reference to the original manuscript.

That question was answered in the following way:

> There is no rule of law that required a clerical mistake in typing a court record from a handwritten manuscript to be preserved or which protected it from being corrected. The fact that the trial record had been signed could not prevent the mistake from being corrected once its existence came to light.

Thus, what emerges from a reading of the above cases is that the purpose towards which a judicial officer or an ex-judicial officer swears an affidavit determines its desirability relevance and justification and whilst it would be improper to explain away or add reasons or supplement a decision thereby, a clerical mistake in a record of proceedings will be corrected by judicial intervention once its existence comes to light, despite the record having been certified. With those observations in mind I now turn to Mr Satchi's affidavit.

A reading of it shows that it is a straight forward account of what transpired in front of him sitting as a magistrate and what he recorded in his handwritten notes of evidence, without in any way making reference to the certified notes of proceedings or attempting to amend the latter as alleged. Since it is his own hand writing that is now the subject of dispute, I find Mr Satchi's affidavit very relevant to the issue at hand. It is apparent from looking at his handwritten notes that whoever had the task of preparing the typed notes of proceedings had some difficulty deciphering his writing because throughout the relevant page, there are many instances where immediately above a particular written word another word appears, spelling out more legibly the word it deciphers or attempts to decipher. And it is with reference to the work 'argue' which appears above his own written word that Mr Satchi has directed para 7 and 8 of his affidavit which reads as follows:

> (7) I pray leave to this Honourable Court to refer to exhibit 'WS-2', wherein the para highlighted in yellow reads as follows:
>
> > 'Mr Hoh agrees with Theivanthiran and vice versa that the decision in this case will be binding on all the other 13 Civil Actions No 4/83, 5/83, 7/83, 8/83, 9/83, 10/83, 11/83, 13/83, 16/83, 19/83, 22/83, 23/83, 24/83 as the plaintiff will be asked the same questions and will give the same evidence in all the other 13 above actions, and that the plaintiff is the same in all the 16 actions and also all the Defendants in the 14 actions occupy the same lease Negeri Lot 24 Mukim of Ulu Telom.
>
> (8) I further state that word 'argues' which is marked in blue which appears above the word agrees is not my notation. Further I say that the said notation is wrong.

I find this explanation acceptable and one that accords with my own finding that in the handwritten notes the word agrees is quite legible and that the word 'argue' is obviously a clerical error at deciphering the word 'agrees'. I also find that the word 'agrees' gives to the rest of the recorded passage its correct sense and meaning whereas the word 'argue' renders the whole of the passage in which it is found meaningless. As pointed out by counsel for the respondents, if there was no agreement to be bound, the presiding magistrate would not need to record that fact in his notes of proceedings

since the matter would not have arisen for discussion in MC 14/83. With that submission, I agree. A

In the circumstances, I am satisfied that Mr Satchi was fully justified in swearing his affidavit which cannot be categorized as scandalous, irrelevant or oppressive as the appellant has sought to. Mr Satchi's affidavit should not be struck out but instead received and read, and when this is done it becomes clear that the appellant had by their counsel agreed that the decision in MC 14/83 would bind the 13 other cases mentioned. That being the case, it is not open to the appellant to now apply to amend their statements' of claim in those 13 cases. As regards four of the present appeals which are not part of the 13 cases mentioned in the notes of proceedings in MC 14/83, namely MC 15/83, MC 17/83, MC 18/83 and MC 20/83, I find the decision in MC 14/83 did not bind them. There is no legal basis for the submissions of Mr Atithan, learned counsel for the respondents that because these four appeals were always treated like the other 13 cases by implication the decision in MC 14/83 will apply to them. However, this does not mean that the appellant succeeds in this appeal in respect of these four cases for reasons that become apparent soon. I also wish to make it clear that in arriving at my decision that the appellant had agreed that the decision in MC 14/83 will bind the 13 other cases, I have not found it necessary to rely on the four judgments written by Mr Satchi in MC 15/83, MC 17/83, MC 19/83 and MC 20/83 or on paras 12 and 13 of his affidavit. B C D

Before leaving this subject, there is a submission of counsel for the appellant that needs to be addressed. It is said that unless there was an order consolidating all the suits pursuant to O 8 r 18 of the SCR, the decision made in MC 14/83 cannot bind the other 13 suits. I regret I am unable to agree with this submission because a proper reading of that order shows that nowhere is it stated that on a consolidation of several actions, a decision in one will bind the others. An agreement between the parties that a decision in one suit will bind the parties in another suit can therefore arise independent of an order of consolidation. E F

Do the amendments change the character of the suits

It is the appellant's case that the amendments do not change the character of the suits because the relief prayed for, namely, possession of the said land remains unchanged and that even if the character of the suits do change, the amendments should be allowed as they are founded on the same facts as already pleaded. G

Whilst I agree that the relief sought remaining unchanged is a factor that should be taken into account, in my judgment, the court will concern itself more with the facts relied upon by the appellant in claiming that relief because it is principally upon those facts that the court will arrive at a finding on whether or not the character of the suit has changed. On the facts as presently pleaded, the appellant's claim to possession of the said land is founded on a cause of action pleaded in tenancy, an oral tenancy to be exact, and one which had been duly terminated by a proper notice to quit. However, what the amendments seek to do is to assert a right to possession H I

A founded on a cause of action pleaded essentially in trespass, even though the word trespass is not actually used, which relies upon the following new facts which were not pleaded before:

(a) the appellant only became owners of the land in 1976;

(b) the respondents occupy the said land without the consent and/or
B permission of the appellant.

(c) upon discovering the name of the respondents the appellant served on the respondents a notice to vacate the land.

It is evident that the appellant in fact seeks to substitute one cause of action with another of inconsistent character based on facts which are not the same
C or substantially the same as already pleaded; a tenancy and rights associated with tenancy essentially arise out of contract whereas, trespass is founded in tort. I therefore find counsel's submission on this issue cannot be supported.

D *Delay, bona fides and prejudice*

Counsel for the appellant submits that the court should not concern itself too much with the question of delay because an amendment may be made at any stage of the proceedings. The submission of counsel overlooks one important factor, it is this: after pleadings are deemed to be closed, an
E amendment can be made only with leave of the court; it becomes a matter at the discretion of the court and when a party requires discretion to be exercised in its favour, delay is always a relevant consideration in the grant or withholding of it because a court will only assist the vigilant and not the indolent (see *Khor Cheng Wah v Sungai Way Leasing Sdn Bhd* [1996] 1 MLJ 223 at p 229). The pleadings have long closed in all these cases and the
F appellant has waited for some 12 years in applying for amendments without any explanation why they have not come sooner, and must accordingly be a factor to be given some weight when considering the overall question of whether or not an amendment should be allowed. I also find that the delay in making the application to amend reflects the lack of bona fides of the appellant in only seeking the amendment now.

G The ostensible reason for the amendment is stated in para 4 of the affidavit sworn by Mr Hoh Kiang Po in support of the appellant's application. He states that the amendments are sought to bring all the true facts to the forefront of the honourable court. Now, if the appellant has been owner of the said land since 1976 and if since 1982 they were aware of the
H presence of the respondents on their land as trespassers and if since 1982 they had given them notice to leave as alleged, why has it taken them some 12 years to come forward to put these facts before the court. To me, the fact that they only seek to do so now indicates that this amendment is a belated manoeuvre designed to extricate the appellant from the awful position they have found themselves in with the result in MC 14/83 where the learned
I magistrate found an equity in favour of the defendant in that suit to remain on the said land for life. Having agreed to be bound by that decision, the appellants are similarly obliged to let 13 out of the 16 appellants here

remain for life on the said land. The amendments now sought are a veiled attempt to reopen the 13 suits in which the appellant is bound by the decision in MC 14/83 and if allowed will result in the appellant enjoying an improved position in all 16 suits by being allowed to plead a new cause of action and one that is free of the infirmities of the case pleaded in tenancy upon which findings of fact have been arrived at in MC 14/83. In the circumstances, I find the application clearly lacks bona fides.

I also find that if allowed, the amendments would result in prejudice to the respondents which cannot be compensated for by payment of cost because insofar as 13 of the present 16 respondents are concerned, their cases have been decided with certainty in their favour some 12 years ago; to allow the amendments would result in their cases being reopened which in turn would result in uncertainty hanging over their heads once again. This is a matter that cannot be compensated in costs. As regards the four respondents in MC 15/83, MC 17/83, MC 18/83 and MC 20/83, whilst they do not enjoy the same position as the other 13 respondents, the attempt by the appellant to change the character of their suits, the delay of the appellant in making this application and the lack of bona fides in so doing would prevent the court from exercising discretion in favour of granting the application. It would in the circumstances be manifestly unjust to do so.

With reference to the submission of counsel for the appellant that as the respondents have not themselves filed any affidavit in reply to the affidavit sworn by Hoh Kian Po in support of the appellant's application to amend it is not open to the respondents to take the objections on delay, prejudice, and bona fides as they have done, I found no merit in this submission. Firstly, the affidavit of Hoh Kian Po does not itself make any material assertions of fact on these matters which call for a specific reply, and secondly, it is open to the respondents to take these objections and base their submissions on the undisputed facts already disclosed in the material before the court.

I accordingly dismiss all these appeals with costs. The decision of the learned magistrate is affirmed.

Appeal dismissed.

Reported by Andrew Christopher Simon